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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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ELLEN S. WERTHEIM, etc., Plaintiff, vs. TOYOTA MOTOR SALES, USA, INC, d/b/a LEXUS, Defendant.	Case No. 2:16CV02370-MCA-MAH **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT TOYOTA MOTOR SALES, USA, INC'S MOTION TO DISMISS PLAINTIFF'S** MOTION DATE: AUGUST 15, 2016 **ORAL ARGUMENT REQUESTED** ECF CASE

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INTRODUCTION AND RELEVANT FACTUAL BACKGROUND

Plaintiff Ellen S. Wertheim is suing Toyota Motor Sales, USA, Inc. ("Toyota") because she paid $190 for the Cold Weather Package for her 2015 Lexus model GS 350 based on her belief that the Cold Weather Package included a heated steering wheel, when according to Wertheim, it did not. Compl. ¶¶ 3, 21.

The crux of Plaintiff's Violation of the New Jersey Consumer Fraud Act ("NJCFA") claim, the only claim she is pursuing, is that Toyota's advertising misrepresented in its brochure and on its website that the Cold Weather Package for 2015 Lexus GS 350 vehicles included a heated steering wheel. *Id.* at ¶¶ 17, 18, 21.

The problem for Plaintiff is that she fails to meet the heighted pleading requirements for fraud-based claims under Rule 9(b) of the Federal Rules of Civil Procedure because she fails to allege she was exposed to and relied on any representation or omission by Toyota related to a heated steering wheel prior to her purchase of her vehicle. Rather, Plaintiff alleges she believed the Cold Weather Package for her 2015 Lexus GS 350 vehicle included a heated steering wheel because "Plaintiff had previously leased earlier model Lexus automobiles and in each occasion paid for and in fact received as part of the Cold Weather Package a heated steering wheel." *Id.* at ¶ 3. Plaintiff's mistaken belief based on her purchase of previous Lexus vehicles does not save her NJCFA. In short, because Plaintiff fails to allege she was exposed to and relied on any representation or omission by Toyota prior to her purchase of her vehicle her NJCFA claim, and thus her complaint in its entirety, must be dismissed.

LEGAL STANDARD AND ARGUMENT

I. Plaintiff's NJCFA Claim Should Be Dismissed Because it Fails to Meet Rule 9(b)'s Heightened Pleading Requirement

The NJCFA prohibits:

> [t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression, or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby….

N.J.S.A. § 56:8-2.

Plaintiff's NJCFA claim is governed by Federal Rules of Civil Procedure Rule 9(b)'s pleading requirements. *See Fredrico v. Home Depot*, 507 F.3d 188, 200 (3d Cir. 2007). Under that standard, a plaintiff "must state the circumstances of the alleged fraud with sufficient particularity to place the defendant on notice of the precise misconduct with which it is charged." *Id*. "Rule 9(b) requires, at a minimum, that plaintiffs support their allegations of [] fraud with all of the essential factual background that would accompany the first paragraph of any newspaper story — that is, the who, what, when, where and how of the events at issue." *In re Suprema Specialties Inc., Sec. Litig.*, 438 F.3d 256, 276-77 (3d Cir. 2006) (internal quotation omitted). Specifically, for NJCFA claims, "Rule 9(b) requires a plaintiff to plead: (1) a specific false representation [or omission] of material fact; (2) knowledge by the person who made it of its falsity; (3) ignorance of falsity by the person to whom it was made; (4) the intention that it should be acted upon; and (5) that the plaintiff suffered and ascertainable loss as a result of the misrepresentation." *Alban v. BMW of North America, LLC*, 2010 U.S. Dist. LEXIS 94038, at *31-32 (D.N.J. Sept. 8, 2010).

Plaintiff's allegations in support of her NJCFA claim fall short of satisfying Rule 9(b)'s heightened pleading requirement. Patently absent from Plaintiff's allegations is *who* exactly spoke with Plaintiff, *what* the representative specifically said to Plaintiff that constituted concealment, *what* Plaintiff found to be material about the representative's statements, and *when* these statements were made to Plaintiff.

II. The NJCFA Requires Proximate Cause

A private plaintiff may only pursue a cause of action under the NJCFA if he or she suffers an "ascertainable loss . . . as a result of" the defendant's deceptive act or omission. *Int'l Union of Operating Eng'rs Local #68 v. Merck & Co.*, 192 N.J. 372, 392 (2007) (plaintiff must "prove a causal nexus between the alleged act of consumer fraud and the damages sustained"). If a plaintiff cannot establish the causal relationship between the ascertainable loss and the unlawful practice, then that plaintiff cannot sustain an NJCFA claim. *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 23 (1994).

A plaintiff pursuing a misrepresentation or omission claim under the NJCFA must allege, and ultimately prove, causation based on "something he or she actually read or saw or heard before buying the product." *Dewey v. Volkswagen AG*, 558 F. Supp. 2d 505, 526-527 (D.N.J. 2008) (dismissing NJCFA claim because "with regard to the statement on Volkswagen's website and in the 2002 Passat owner's manual, the Dewey Plaintiffs do not allege when the statements were made or at what point — if ever— each Plaintiff was exposed to one or more of the statements"); *Luppino v. Mercedes-Benz USA, LLC*, 2011 U.S. Dist. LEXIS 65495, at *8-9 (D.N.J. June 20, 2011) ("[i]t is critical that a plaintiff allege when misstatements were made and at what point a plaintiff was exposed to one or more of those statements").

Although Plaintiff alleges that Toyota's brochure and website indicated that the Cold Weather Package for 2015 Lexus GS 350 vehicles came with a heated steering wheel, the complaint is devoid of any allegations indicating that Plaintiff viewed, read, or relied on any statements by Toyota prior to her purchase. Simply stating that Toyota's brochure and website indicated that the Cold Weather Package for 2015 Lexus GS 350 vehicles came with a heated steering wheel without alleging that she relied on the alleged misrepresentations in the brochure and website does not pass muster under Rule 9(b). *Glass v. BMW of North America, LLC*, 2011 U.S. Dist. LEXIS 149199, at *23 (D.N.J. Dec. 29, 2011) ("Plaintiff cannot simply reference a statement on a website [or in a publication] without providing the date when the statement was made or at what point —if ever — Plaintiff was exposed to that statement").

III. Plaintiff's NJCFA Claim Also Fails to Satisfy Rule 9(b) Regarding Any Alleged Material Omission

Under New Jersey law, to properly allege a fraud claim based on an omission, the complaint must describe the circumstances of the alleged fraud "with precise allegations of date, time, or place *or* by using some means of injecting precision and some measure of substantiation into their allegations of fraud." *See Cooper v. Samsung Electronics America, Inc.*, 2008 U.S. Dist. LEXIS 75810 at *24 (D.N.J. Sept. 29, 2008) (emphasis in original). Conclusory allegations regarding unspecified marketing and advertising materials are insufficient. *Id.*; *see also Parker v. Howmedica Osteonics Corp.*, 2008 U.S. Dist. LEXIS 2570, *9-10 (D.N.J. Jan. 14, 2008).

All that Plaintiff alleges to support her NJCFA omissions claim is "that [by] omitting to state that those consumers who purchased a Cold Weather Package option would not receive a heated steering wheel [Toyota] acted knowingly and intentionally making a material omission in violation of N.J.S.A. 56:8-2." Compl. at ¶ 24. Such conclusory allegations are continuously rejected by the courts and should be rejected here. *See, e.g., Cooper*, 2008 U.S. Dist. LEXIS 75810, at *24 (dismissing NCJFA omission claim because plaintiff's allegations were conclusory and speculative); *Cox*, 138 N.J. 2 at 18 (same); *Parker*, 2008 U.S. Dist. LEXIS 2570, at *9-10 (same); *Glass*, 2011 U.S. Dist. LEXIS 149199, at *24 (same).

CONCLUSION

For the foregoing reasons, Toyota respectfully requests that Plaintiff's Class Action Complaint in its entirety be dismissed.

Dated: July 22, 2016

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